

## **PUBLIC COMMENTS ON DRAFT ADVISORY OPINIONS**

Members of the public may submit written comments on draft advisory opinions.

DRAFT ADVISORY OPINION 2010-14 is now available for comment. It was requested by Marc E. Elias, Esq., and Jonathan S. Berkon, Esq., on behalf of the Democratic Senatorial Campaign Committee, and is scheduled to be considered by the Commission at its public meeting on Thursday, August 26, 2010.

If you wish to comment on the DRAFT ADVISORY OPINION 2010-14, please note the following requirements:

- 1) Comments must be in writing, and they must be both legible and complete.
- 2) Comments must be submitted to the Office of the Commission Secretary by hand deliver or fax ((202) 208-3333), with a duplicate copy submitted to the Office of General Counsel by hand delivery or fax ((202) 219-3923).
- 3) Comments must be received by 3 p.m. (Eastern Time) on August 25, 2010.
- 4) The Commission will generally not accept comments received after the deadline. Requests to extend the comment period are discouraged and unwelcome. An extension request will be considered only if received before the comment deadline and then only on a case-by-case basis in special circumstances.
- 5) All timely received comments will be made available to the public at the Commission's Public Records Office and will be posted on the Commission's website at <http://saos.nictusa.com/saos/searchao>.

## **REQUESTOR APPEARANCES BEFORE THE COMMISSION**

The Commission has implemented a pilot program to allow advisory opinion requestors, or their counsel, to appear before the Commission to answer questions at the open meeting at which the Commission considers the draft advisory opinion. This program took effect on July 7, 2009.

**Under the program:**

- 1) A requestor has an automatic right to appear before the Commission if any public draft of the advisory opinion is made available to the requestor or requestor's counsel less than one week before the public meeting at which the advisory opinion request will be considered. Under these circumstances, no advance written notice of intent to appear is required. This one-week period is shortened to three days for advisory opinions under the expedited twenty-day procedure in 2 U.S.C. 437f(a)(2).**
- 2) A requestor must provide written notice of intent to appear before the Commission if all public drafts of the advisory opinion are made available to requestor or requestor's counsel at least one week before the public meeting at which the Commission will consider the advisory opinion request. This one-week period is shortened to three days for advisory opinions under the expedited twenty-day procedure in 2 U.S.C. 437f(a)(2). The notice of intent to appear must be received by the Office of the Commission Secretary by hand delivery, email ([Secretary@fec.gov](mailto:Secretary@fec.gov)), or fax ((202) 208-3333), no later than 48 hours before the scheduled public meeting. Requestors are responsible for ensuring that the Office of the Commission Secretary receives timely notice.**
- 3) Requestors or their counsel unable to appear physically at a public meeting may participate by telephone, subject to the Commission's technical capabilities.**
- 4) Requestors or their counsel who appear before the Commission may do so only for the limited purpose of addressing questions raised by the Commission at the public meeting. Their appearance does not guarantee that any questions will be asked.**

**FOR FURTHER INFORMATION**

Press inquiries: Judith Ingram  
Press Officer  
(202) 694-1220

Commission Secretary: Shawn Woodhead Werth  
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Comment Submission Procedure: Rosemary C. Smith  
Associate General Counsel  
(202) 694-1650

Other inquiries:

To obtain copies of documents related to 2010-14, contact the Public Records Office at (202) 694-1120 or (800) 424-9530, or visit the Commission's website at <http://saos.nictusa.com/saos/searchao>.

**ADDRESSES**

Office of the Commission Secretary  
Federal Election Commission  
999 E Street, NW  
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Office of General Counsel  
ATTN: Rosemary C. Smith, Esq.  
Federal Election Commission  
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FEDERAL ELECTION COMMISSION  
Washington, DC 20463

SECRETARIAT

2010 AUG 24 P 2: 28

**AGENDA ITEM**  
For Meeting of 8/26/10

August 24, 2010

**SUBMITTED LATE**

**MEMORANDUM**

TO: The Commission

FROM: Christopher Hughey *pch*  
Acting General Counsel

Rosemary C. Smith *RS*  
Associate General Counsel

Amy L. Rothstein *AMR for ALR*  
Assistant General Counsel

Joshua S. Blume *JSB*  
Attorney

Subject: Draft AO 2010-14 (DSCC)

Attached is a proposed draft of the subject advisory opinion. We request that this draft be placed on the agenda for August 26, 2010.

Attachment

1    ADVISORY OPINION 2010-14

2    Marc E. Elias, Esq.  
3    Jonathan S. Berkon, Esq.  
4    Perkins Coie LLP  
5    607 Fourteenth Street NW  
6    Washington, DC 20005-2003

**DRAFT**

7    Dear Messrs. Elias and Berkon:

8           We are responding to your advisory opinion request on behalf of the Democratic  
9    Senatorial Campaign Committee (“DSCC”), concerning the application of the Federal  
10   Election Campaign Act of 1971, as amended (“the Act”), and Commission regulations to  
11   the proposed disbursement and allocation of DSCC recount funds for certain types of  
12   recount expenses it will incur before the date of the upcoming general election.

13           The Commission concludes that the DSCC may use its recount funds to pay for  
14   recount-related expenses that it will incur before the date of the general election as it  
15   prepares for recounts that may occur after the general election. The Commission also  
16   concludes that the DSCC may allocate the cost of certain expenses that are attributable to  
17   both recount activities and campaign activities between the main account that it uses for  
18   campaign activities (its “principal campaign account”) and its recount fund. Both of  
19   these conclusions are subject to certain conditions as described below.

20    ***Background***

21           The facts presented in this advisory opinion are based on your letter received on  
22   June 24, 2010, and your e-mails received on July 6 and July 9, 2010.

23           The DSCC is a national committee of the Democratic Party. In 2009, the DSCC  
24   established a separate account to assist then-Democratic Senate candidate Al Franken in a  
25   statewide recount in Minnesota. The Commission authorized the DSCC to establish this

1 account (the “recount fund”) in Advisory Opinion 2009-04 (Franken/DSCC) and to use it  
2 to pay expenses incurred in connection with recounts and election contests of Federal  
3 elections. *See* Advisory Opinion 2009-04 (Franken/DSCC).

4       The DSCC proposes to make disbursements from its recount fund before  
5 November 2, 2010, the date of the general election for U.S. Senate candidates, to prepare  
6 for recounts and election contests that may occur in connection with the results of those  
7 general elections. Specifically, the DSCC contemplates using the recount fund to pay for  
8 the services of attorneys and staff who will prepare for the post-election period, such as  
9 by conducting recount-related research in States where recounts are most likely. The  
10 payments of fees to attorneys and staff would include both fees for services provided  
11 before Election Day, and advances and retainers for work to be performed after Election  
12 Day. Examples of recount-related activities include researching State laws on recounts  
13 and election contests, developing plans and budgets for anticipated recounts and election  
14 contests, and recruiting volunteers to engage in recounts. The DSCC states that all such  
15 recount-related activities that it proposes to finance with the recount fund will be  
16 dedicated solely to post-election recounts and election contests, and will not be usable for  
17 pre-election campaign-related activities, such as get-out-the-vote activity, voter  
18 registration, and polling. In addition to these expenses, the DSCC also proposes to use its  
19 recount fund to pay the costs associated with soliciting donations to the recount fund.

20       The DSCC proposes to allocate the cost of certain expenses that are attributable to  
21 both recount activities and campaign activities between its principal campaign account  
22 and its recount fund. Specifically, the DSCC proposes to allocate the expenses of  
23 fundraising attributable to the solicitation of both recount funds and campaign funds on a

1 “funds received” basis. *See, e.g.*, 11 CFR 106.1(a) and 106.7(d)(4). The DSCC also  
2 indicates that it may hold fundraising events to raise donations for its recount fund and  
3 contributions for its other accounts at the same time.

4 The DSCC also proposes to allocate the payment of salaries and benefits of staff  
5 who spend part of their time working on campaign activities and part of their time on  
6 recount-related activities. The DSCC indicates that it will have its employees keep a  
7 monthly log of the percentage of time that each employee spends in connection with a  
8 Federal election, should it be permitted to allocate salaries and benefits.

9 In both cases of allocation, the DSCC intends to make an initial payment for all of  
10 the above expenses, both campaign-related and recount-related, from its principal  
11 campaign account, and then to reimburse its principal campaign account from the recount  
12 fund for the proportion of the total expenses attributable to recount activities.

### 13 ***Questions Presented***

14 (1) *May the DSCC make disbursements from its recount fund prior to the date of*  
15 *the general election?*

16 (a) *May the DSCC use recount funds to retain the services of attorneys*  
17 *and staff for possible recounts and election contests?*

18 (b) *May the DSCC use recount funds to pay for legal and other research*  
19 *in preparation for a recount and/or election contest?*

20 (c) *May the DSCC use recount funds to defray the costs of soliciting*  
21 *donations to the recount fund?*

22 (2) *May the DSCC allocate expenses that are attributable to both recount*  
23 *activities and campaign activities?*

1                   (a) *May the DSCC allocate expenses that are attributable to the*  
2 *solicitation of recount funds and campaign funds, based on the “funds received” formula*  
3 *in 11 CFR 106.1(a)?*

4                   (b) *May the DSCC allocate the salary and benefits of staff who spend*  
5 *some of their time on recount activities and some of their time on campaign activities?*

6 ***Legal Analysis and Conclusions***

7                   (1) *May the DSCC make disbursements from its recount fund prior to the date of*  
8 *the general election?*

9                   (a) *May the DSCC use recount funds to retain the services of attorneys*  
10 *and staff for possible recounts and election contests?*

11                   (b) *May the DSCC use recount funds to pay for legal and other research*  
12 *in preparation for a recount and/or election contest?*

13                   (c) *May the DSCC use recount funds to defray the costs of soliciting*  
14 *donations to the recount fund?*

15                   Yes, the DSCC may make disbursements from its recount fund before the date of  
16 the general election for the above-described expenses related to recount preparation,  
17 provided that none of the activities, or the results of those activities, can or will be used  
18 for campaign activities before election day, and provided that the accounting and  
19 reporting procedures set forth below are followed.

20                   The Act and Commission regulations define the terms “contribution” and  
21 “expenditure” to include any gift, loan, or payment of money or anything of value for the  
22 purpose of influencing a Federal election. *See* 2 U.S.C. 431(8)(A)(i) and (9)(A)(i);  
23 11 CFR 100.52(a) and 100.111(a). Commission regulations explicitly exempt from the

1 definitions of “contribution” and “expenditure” “a gift, subscription, loan, advance, or  
2 deposit of money or anything of value made with respect to a recount of the results of a  
3 Federal election, or an election contest concerning a Federal election.” 11 CFR 100.91  
4 and 100.151. Nevertheless, the prohibitions of 11 CFR 110.20 (foreign nationals) and  
5 part 114 (corporations, labor organizations, and national banks) apply to funds given for  
6 recount activities. *Id.*; *see also* 2 U.S.C. 441b(a) and 441e(a)(1)(A).

7       The Bipartisan Campaign Reform Act of 2002<sup>1</sup> (“BCRA”) amended the Act by,  
8 in pertinent part, prohibiting national party committees from soliciting, receiving, or  
9 directing to another person a contribution, donation, or transfer of funds or any other  
10 thing of value, or spend any funds, that are not subject to the limitations, prohibitions and  
11 reporting requirements of the Act. 2 U.S.C. 441i(a)(1); *see also* 11 CFR 300.10(a). In  
12 2006, the Commission considered these prohibitions in the context of recount funds and  
13 concluded that national party committees must pay for all of their recount activities using  
14 entirely Federal funds. *See* Advisory Opinion 2006-24 (NRSC/DSCC) (answer to  
15 question 3). In 2009, the Commission concluded that the Act permits the DSCC to create  
16 the recount fund involved in this request, and to use that fund to pay expenses incurred in  
17 connection with recounts and election contests of Federal elections, such as the 2008 U.S.  
18 Senate recount and election contest in Minnesota.<sup>2</sup> Advisory Opinion 2009-04  
19 (Franken/DSCC).

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<sup>1</sup> Pub. L. 107-155, 116 Stat. 81 (2002).

<sup>2</sup> Donations to the recount fund are subject to the amount limitations, source prohibitions, and reporting requirements of the Act, but they are not aggregated with contributions from individuals for purposes of the calendar year contribution limits set forth in 2 U.S.C. 441a(a)(1)(B); the aggregate biennial contribution limits of 2 U.S.C. 441a(a)(3), limiting an individual’s total contributions to all candidates and political committees over a two-year period, do not apply to donations to recount funds. Advisory Opinion 2009-04 (Franken/DSCC).

1           Neither the Act, nor the Commission’s regulations, nor prior advisory opinions  
2 address when recount funds may be raised or spent. On its face, the exclusion of  
3 donations and disbursements “made with respect to a recount of the results of a Federal  
4 election, or an election contest concerning a Federal election” from the definitions of  
5 “contribution” and “expenditure” is not limited to the post-election period. *See* 11 CFR  
6 100.91 and 100.151.

7           By contrast, Commission regulations do speak to the time frame during which  
8 other types of funds may be spent. *See* 11 CFR 102.9(e)(3) (requiring the refund of all  
9 general election contributions if a candidate does not become a candidate in the general  
10 election). The Commission has, in limited circumstances, approved disbursements  
11 similar to those at issue here. For example, the Commission has allowed a candidate to  
12 spend general election funds prior to the date of the primary election where it was  
13 “necessary to make advance payments or deposits to vendors for services that [would] be  
14 rendered...with respect to the [potential] general election” and that would not “influence  
15 the primary election or nominating process or ... [be] for goods or services to be used in  
16 both the primary and general elections.” Advisory Opinion 1986-17 (Green).<sup>3</sup> Likewise,  
17 the DSCC proposes to retain the services of attorneys and staff to conduct research and  
18 make preparations for a potential recounts and election contests that will take place, if at  
19 all, after the general election. Accordingly, the Commission concludes that the DSCC  
20 may use the recount fund to pay recount-related expenses it will incur before the  
21 November 2010 general election, such as retaining the services of attorneys and staff for

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<sup>3</sup> Such advance payments are limited to goods or services that are provided or rendered after a candidate has established his or her candidacy for the general election. *Id.*

1 the purpose of conducting research and making preparations for possible recounts and  
2 election contests.

3 The DSCC may also use recount funds to defray the costs of soliciting donations  
4 to the recount fund. Commission regulations generally permit (and in some cases  
5 require) the proceeds of fundraising activities to be used to defray the costs of those  
6 activities. For example, a joint fundraising committee is required to deduct the  
7 participants' allocable share of expenses before distributing the proceeds from an event.  
8 *See* 11 CFR 102.17(c)(7)(i)(A). Likewise, general election legal and accounting  
9 compliance (GELAC) funds may be used to defray the cost of soliciting contributions to  
10 the GELAC fund.<sup>4</sup> *See* 11 CFR 9003.3(a)(2)(i)(E). Moreover, a legal expense trust fund  
11 may be used, in part, to pay the cost of raising money for the trust fund. *See* Advisory  
12 Opinion 2003-15 (Majette).

13 In holding fundraising events at which the DSCC will raise both contributions and  
14 recount funds, the DSCC's recount solicitations must clearly state the purpose of the fund  
15 and note that no donations to the fund will be used for the purpose of influencing any  
16 Federal election. *See e.g.* 11 CFR 9003.3(a)(1)(A).

17 These conclusions are premised on the DSCC's representation that none of its  
18 proposed recount activities can or will be used to campaign for any candidates or to  
19 influence any elections. Instead, recount activities paid for by the recount fund must have  
20 no relation to campaign activities. *See* Advisory Opinion 1978-92 (Miller) ("[I]n view of  
21 the special treatment and exemption accorded funds received and spent for recount

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<sup>4</sup> Under Commission regulations and guidance, publicly funded presidential campaigns may, under certain conditions, establish a GELAC account to pay for legal compliance and accounting expenses. *See generally* 11 CFR 9003.3 and Explanation and Justification for Final Rules on Public Financing of Presidential General Election Campaigns, 45 Fed. Reg. 43371, 43373 (Jun. 27, 1980).

1 purposes, any resulting surplus of funds may not be used in any manner that would  
2 constitute a contribution or expenditure under the Act or regulations.”). The DSCC must  
3 report all of its disbursements from its recount fund in accordance with 2 U.S.C. 434(a)  
4 and (e) and 11 CFR 104.3 (“other receipts and disbursements”) and 300.13(a). It may  
5 continue to use lines 17 (“Other Federal Receipts”) and 29 (“Other Disbursements”) of  
6 FEC Form 3X, “Report of Receipts and Disbursements,” for this purpose.

7 *(2) May the DSCC allocate expenses that are attributable to both recount*  
8 *activities and campaign activities?*

9 *(a) May the DSCC allocate expenses that are attributable to the*  
10 *solicitation of recount funds and campaign funds, based on the “funds received”*  
11 *formula in 11 CFR 106.1(a)?*

12 *(b) May the DSCC allocate the salary and benefits of staff who spend*  
13 *some of their time on recount activities and some of their time on campaign*  
14 *activities?*

15 Yes, the DSCC may allocate expenses that are attributable to both recount  
16 activities and campaign activities. The DSCC may allocate expenses attributable to the  
17 solicitation of recount funds and campaign funds based on the “funds received” formula  
18 in 11 CFR 106.1(a). Likewise, the DSCC also may allocate the salary and benefits of  
19 staff who work on both recount and campaign activities.

20 Neither the Act, Commission regulations, nor prior advisory opinions address the  
21 allocation of expenses incurred for both recount and campaign purposes. Commission  
22 regulations do, however, generally permit (and in some cases require) the allocation of  
23 expenses attributable to more than one purpose. *See generally* 11 CFR 102.5(a), Part

1 106, Part 300, and 9003.3(a)(2)(ii). Although these regulations do not apply here, they  
2 do stand generally for the proposition that allocation is an appropriate way to fund  
3 activities with multiple purposes.

4 With respect to fundraising expenses, the Commission concludes that the DSCC's  
5 proposal to allocate its fundraising costs based on the ratio of funds received for its  
6 principal campaign account to its total receipts from each fundraising program or event is  
7 appropriate.<sup>5</sup> *See, e.g.*, 11 CFR 106.1(a)(1) (“[i]f funds are collected by one committee  
8 for more than one clearly identified candidate, the attribution shall be determined by the  
9 proportion of funds received by each candidate.”); 106.6(d)(1) (“[i]f federal and non-  
10 federal funds are collected by one committee through a joint activity, that committee shall  
11 allocate its direct costs of fundraising... according to the funds received method.”); and  
12 106.7(d)(4) (“[i]f Federal and non-Federal funds are collected by a State, district, or local  
13 party committee, through a joint fundraising activity, that committee must allocate its  
14 direct fundraising costs using the funds received method.”). The DSCC may, as it has  
15 proposed, make an initial payment for all of the fundraising expenses, both campaign-  
16 related and recount-related, from its principal campaign account, and then reimburse its  
17 principal campaign account from the recount fund for the proportion of the total  
18 fundraising expenses attributable to recount activities. If the DSCC's recount fund  
19 reimburses its principal campaign account for the allocable portion of fundraising  
20 expenses, it must do so within a reasonable period of time. The Commission considers  
21 reimbursement within sixty days after payment is made from the election accounts to be

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<sup>5</sup> The DSCC must disclose this ratio to the Commission for each fundraising program or event. As a paper filer, the DSCC may disclose the ratio in a cover letter accompanying the report covering the period during which reimbursement is made from the recount fund to the election accounts for the portion of the fundraising costs attributable to recount activities.

1 reasonable for this purpose. *See, e.g.*, 11 CFR 106.6(e)(2) and 106.7(f)(2)(i).

2         With respect to the allocation of staff salaries and benefits, the Commission  
3 concludes that the DSCC’s proposal to allocate staff salary and benefits between the  
4 recount fund and principal campaign account based upon a monthly log of the percentage  
5 of time each employee spends in connection with recount activities and campaign  
6 activities is permissible. As noted by Requestor, the allocation of salaries and wages  
7 between Federal and non-Federal accounts of State and local party committees is  
8 conditioned on the maintenance of monthly logs recording the percentage of time each  
9 employee spends in connection with a Federal election. Additionally, under Commission  
10 regulations and guidance, a publicly funded presidential campaign may allocate between  
11 the GELAC and the general campaign the salaries and benefits of staff who work on both  
12 compliance and election activities. While the GELAC allocation percentages are  
13 generally prescribed by regulation, this rule also provides for any other allocation,  
14 provided that records are maintained to support such an allocation. The DSCC’s proposal  
15 is consistent with this approach as it is based upon the keeping of accurate records in the  
16 form of monthly time logs.

17         Although donations to the DSCC’s recount fund are subject to the Act’s amount  
18 limitations, source prohibitions, and reporting requirements, recount funds may  
19 nevertheless not be used to pay for campaign activities. *See* Advisory Opinions  
20 2006-24 (NRSC/DSCC) (answer to question 2(d)) and 2009-04 (Franken/DSCC)  
21 (permitting establishment of DSCC recount fund for payment of “expenses incurred in  
22 connection with recounts and election contests of Federal elections”). Thus, the DSCC  
23 should keep records indicating which duties are considered recount activities and which

1 are considered election contest activities as well as a monthly log recording the  
2 percentage of time each employee spends on campaign activities as opposed to recount  
3 activities.<sup>6</sup> *See, e.g.*, 11 CFR 106.7(d)(1) and 9003.3(a)(2)(ii)(C). If, as proposed, the  
4 DSCC initially pays all staff salaries and benefits from its principal campaign account,  
5 the DSCC's recount fund may reimburse its principal campaign account for the allocable  
6 portion of salaries and benefits. *See, e.g.*, 11 CFR 106.7(f)(2)(i) and 9003.3(a)(2)(ii)(A).

7 For reporting purposes, the DSCC must disclose the entire amount paid by the  
8 principal campaign account of the cost of fundraising and of the salaries and benefits of  
9 employees who spend some of their time on recount activities and some of their time on  
10 campaign activities on line 21(b) ("Other Federal Operating Expenses") of FEC Form  
11 3X. The portion of such fundraising costs and staff salaries and benefits attributable to  
12 recount activities must be disclosed on line 29 ("Other Disbursements") of that form.  
13 Finally, reimbursements from the recount fund to the election accounts must be disclosed  
14 on line 17 ("Other Federal Receipts").

15 This response constitutes an advisory opinion concerning the application of the  
16 Act and Commission regulations to the specific transaction or activity set forth in your  
17 request. *See* 2 U.S.C. 437f. The Commission emphasizes that, if there is a change in any  
18 of the facts or assumptions presented and such facts or assumptions are material to a  
19 conclusion presented in this advisory opinion, then the requester may not rely on that

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<sup>6</sup> Under this advisory opinion, the 25% threshold at 11 CFR 106.7(d)(1)(i) and (ii) is not applicable to the DSCC's proposed allocation of the cost of staff salaries and benefits between the recount fund and principal campaign account because both accounts contain funds that are subject to the amount limitations, source prohibitions and reporting requirements of the Act. It may allocate such costs according to its proposal based on the actual amount of time each employee spends on campaign activities versus the time spent on recount activities during the reporting period, and must disclose this ratio. As a paper filer, the DSCC may state the allocation ratio in a cover letter accompanying the report covering the period during which reimbursement is made from the recount fund to the election accounts.

1 conclusion as support for its proposed activity. Any person involved in any specific  
2 transaction or activity which is indistinguishable in all its material aspects from the  
3 transaction or activity with respect to which this advisory opinion is rendered may rely on  
4 this advisory opinion. *See* 2 U.S.C. 437f(c)(1)(B). Please note that the analysis or  
5 conclusions in this advisory opinion may be affected by subsequent developments in the  
6 law including, but not limited to, statutes, regulations, advisory opinions and case law.  
7 The cited advisory opinion is available on the Commission's website at  
8 <http://saos.nictusa.com/saos/searchao>.

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On behalf of the Commission,

Matthew S. Petersen  
Chairman